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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 FRANK EARL BOUDWAY; and
13 PATRICIA ANNE BOUDWAY,
14
15 vs.
16 FEDERAL NATIONAL MORTGAGE
17 ASSOCIATION; BANK OF
18 AMERICA, NATIONAL
ASSOCIATION; MORTGAGEIT,
INC.; and DOES 1-100,
Defendants.

CASE NO. 13cv499-WQH-BGS
ORDER

HAYES, Judge:

19 The matter before the Court is the Motion to Dismiss filed by Defendants Federal
20 National Mortgage Association (“FNMA”) and Bank of America, National Association
21 (“BOA”). (ECF No. 5).

22 **I. Background**

23 **A. Factual Allegations of the Complaint**

24 On December 11, 2006, Plaintiffs Frank Earl Boudway and Patricia Anne
25 Boudway (“Plaintiffs”) obtained a \$417,000 loan from Mortgageit, Inc., and secured
26 repayment of the loan with a deed of trust encumbering the subject San Diego property.
27 (Complaint, ECF No. 1 ¶ 15). The deed of trust named Chicago Title Company as the
28 trustee, and Mortgage Electronic Registration Systems, Inc. (“MERS”) as the

1 beneficiary. *Id.*

2 On June 11, 2010, Recontrust Company, as the agent for the beneficiary of the
3 deed of trust, commenced the nonjudicial foreclosure of the subject deed of trust. *Id.*
4 ¶ 16. On June 22, 2010, MERS recorded a document to substitute Recontrust Company
5 as trustee under the deed of trust, and to assign the deed of trust to BAC Home Loans
6 Servicing, LP FKA Countrywide Home Loans Servicing, LP (which was later
7 succeeded by Defendant BOA). *Id.* ¶ 17.

8 Plaintiffs defaulted on their repayment of the loan, and a Notice of Default was
9 recorded in the office of the County Recorder for San Diego County in June 2010. *Id.*
10 ¶ 17. When Plaintiffs failed to cure the default, a notice of trustee's sale was recorded
11 on September 20, 2010. *Id.* ¶ 18. The sale went forward on July 25, 2011, and
12 Defendant FNMA purchased the property for \$322,300. *Id.* ¶ 20.

13 **B. State Court Proceedings**

14 Shortly after the July, 2011 sale, Plaintiffs filed an action for wrongful
15 foreclosure against BOA and FNMA in the San Diego County Superior Court, Case No.
16 37-2011-00070139 ("the state court action"). (State Court First Amended Complaint,
17 ECF No. 5-6 at 37-46). The First Amended Complaint in the state court action asserted
18 several claims, which are all related to the servicing of the loan and the July, 2011
19 foreclosure of the subject property. *Id.* The First Amended Complaint in the state
20 court action alleged the following claims for relief: (1) Set Aside Trustee Sale; (2) Quiet
21 Title; (3) Cancel Trustees Deed; (4) Accounting. In July, 2012, the Superior Court
22 sustained the demurrer of Defendants BOA and FNMA without leave to amend and
23 entered an order of dismissal with prejudice. (ECF No. 5-6 at 49-50).

24 **C. Federal Court Proceedings**

25 On March 4, 2013, Plaintiffs initiated this action by filing a Complaint against
26 Defendants FNMA, BOA and MortgageIt, Inc., asserting several claims which arise out
27 of or are related to the servicing and the July, 2011 foreclosure of the subject loan and
28 the subject property. (ECF No. 1). The Complaint alleges the following claims for

1 relief: (1) Declaratory Relief; (2) Negligence; (3) Quasi Contract; (4) Violation of 15
 2 U.S.C. § 1692, *et seq.*; (5) Violation of California Business and Professions Code
 3 Section 17200, *et seq.*; (6) Accounting; (7) Violation of 18 U.S.C. § 1951(b)(2) -
 4 Extortion.

5 On August 7, 2013, Defendants FNMA and BOA filed a Motion to Dismiss all
 6 claims in the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF
 7 No. 5). On September 25, 2013, Plaintiffs filed an opposition. (ECF No. 10). On
 8 September 27, 2013, Defendants FNMA and BOA filed a reply. (ECF No. 11).

9 **II. Discussion**

10 **A. Standard of Review**

11 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
 12 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of
 13 Civil Procedure 8(a) provides that “[a] pleading that states a claim for relief must
 14 contain ... a short and plain statement of the claim showing that the pleader is entitled
 15 to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) is appropriate where
 16 the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
 17 legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

18 A plaintiff’s “grounds” to relief must contain “more than labels and conclusions,
 19 and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl.*
 20 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). When
 21 considering a motion to dismiss, a court must accept as true all “well-pleaded factual
 22 allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is not
 23 “required to accept as true allegations that are merely conclusory, unwarranted
 24 deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266
 25 F.3d 979, 988 (9th Cir. 2001). “In sum, for a complaint to survive a motion to dismiss,
 26 the non-conclusory factual content, and reasonable inferences from that content, must
 27 be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
 28 *Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

1 **B. Res Judicata**

2 Defendants FNMA and BOA contend that each of Plaintiffs' claims in this case
3 arise out of the 2011 foreclosure of the subject property and the servicing of the subject
4 loan, and were raised or could have been raised in the state court action which
5 concerned the same 2011 foreclosure on the subject property and the servicing of the
6 subject loan. Defendants contend that each of Plaintiffs' claims is therefore barred by
7 *res judicata*, and the Complaint must be dismissed. (ECF No. 5-2 at 9-10).

8 Plaintiffs contend that this action is fundamentally different from the state court
9 action. The instant action alleges that Defendants "transferred the promissory note
10 and/or the deed of trust to a trust or other entity for the purpose of creating Mortgage
11 Backed Securities," and that "attempted transfers to securitized trusts were ineffective
12 and defective." *Id.* at 3. Plaintiffs contend that "there were no factual allegations in the
13 prior action concerning securitization trust and mortgage backed securities," so the
14 instant action is not barred by *res judicata*. (ECF No. 10 at 4).

15 *Res judicata* precludes the re-litigation of a cause of action that was litigated in
16 a prior proceeding. "The Full Faith and Credit Act, 28 U.S.C. § 1738 ... requires a
17 federal court to 'give the same preclusive effect to a state-court judgment as another
18 court of that State would give.'" *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544
19 U.S. 280, 293 (2005); *see also Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S.
20 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment
21 the same preclusive effect as would be given that judgment under the law of the state
22 in which the judgment was rendered."). This Court applies California preclusion law
23 in determining whether Plaintiffs' claims are barred by *res judicata*.

24 Under California law, *res judicata* applies if "three requirements are satisfied: (1)
25 the present action is on the same cause of action as the prior proceeding; (2) the prior
26 proceeding resulted in a judgment on the merits; and (3) the parties in the present action
27 or parties in privity with them were parties to the prior proceeding." *Bullock v. Philip*
28 *Morris USA, Inc.*, 198 Cal. App. 4th 543, 557 (2011) (citations omitted). *Res judicata*

1 not only bars causes of action that were actually litigated in a prior action, it also
 2 “precludes the litigation of issues that could have been litigated in the prior
 3 proceeding.” *Id.*

4 An issue is one that could have been raised in the prior proceeding “‘if the matter
 5 was within the scope of the action, related to the subject matter and relevant to the
 6 issues.’” *Amin v. Khazinder*, 112 Cal. App. 4th 582, 589-90 (2003) (quoting *Tensor*
 7 *Group v. City of Glendale*, 14 Cal. App. 4th 154, 160 (1993)). “[E]ven though the
 8 causes of action [may] be different, the prior determination of any issue is conclusive
 9 in a subsequent suit between the same parties as to that issue and every matter which
 10 might have been urged to sustain or defeat its determination.” *Id.* (quoting *Krier v.*
 11 *Krier*, 28 Cal. 2d 841, 843 (1946)).

12 Plaintiffs bring the instant case against BOA, FNMA, and Mortgageit, Inc. The
 13 state court action was brought against BOA and FNMA. The state court action ended
 14 with an order and judgment of dismissal in favor of BOA and FNMA after a demurrer
 15 was sustained with prejudice and without leave to amend. Because the state court
 16 action resulted in a judgment on the merits, and the parties to the present action were
 17 parties to the state court action¹, the second and third requirements of *res judicata* under
 18 California law have been met. *See Bullock*, 198 Cal. App. 4th at 557.

19 Plaintiffs are barred from raising any claims that were or could have been raised
 20 in the state court action. (ECF No. 5-2 at 9). All of the claims in this case and in the
 21 state court action challenge the 2011 foreclosure sale of the subject property, and
 22 Defendant’s rights to collect on Plaintiff’s loan. Both cases directly address defects in
 23 the foreclosure process. The issues raised in this case are within the scope of the issues
 24 raised in the state court action, related to the subject matter of the state court action, and
 25 relevant to the issues raised in the state court action. *See Amin*, 112 Cal. App. 4th at
 26 589-90. *Res judicata* bars Plaintiffs from bringing the instant action against Defendants

27
 28 ¹ Mortgageit, Inc. was not a party to the state court action, and has not moved for
 dismissal. Accordingly, at this point in the proceedings, *res judicata* does not preclude
 Plaintiffs’ claims against Defendant Mortgageit, Inc.

1 BOA and FNMA.

2 **C. Show Cause as to Defendant Mortgageit, Inc.**

3 On March 4, 2013, Plaintiffs filed the Complaint in this matter. To date, proof
4 of service has not been filed for any defendant. The docket reveals that Defendant
5 Mortgageit, Inc. has not entered an appearance or responded in any way to the
6 Complaint.

7 “A federal court is without personal jurisdiction over a defendant unless the
8 defendant has been served in accordance with Fed. R. Civ. P. 4.” *Travelers Cas. & Sur.*
9 *Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009) (quotation omitted). Rule
10 4 provides that “[a] summons shall be served together with a copy of the complaint,”
11 Fed. R. Civ. P. 4(c)(1), and that the summons and complaint must be served “within 120
12 days after the filing of the complaint,” Fed. R. Civ. P. 4(m). If a plaintiff fails to
13 properly serve the summons and complaint within 120 days, the court may dismiss the
14 action without prejudice after notice to the plaintiff. *See id.*

15 This Order constitutes notice to Plaintiffs that the Court will dismiss this action
16 without prejudice as to Defendant Mortgageit, Inc. **thirty (30) days from the date this**
17 **Order is filed**, unless, no later than that date, Plaintiff files: (1) proof that service of the
18 Summons and Complaint was effectuated as to Defendant Mortgageit, Inc., or (2) a
19 declaration under penalty of perjury showing good cause for failure to serve Defendant
20 Mortgageit, Inc., accompanied by a motion for extension of time to serve process.

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1 **III. Conclusion**

2 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendants
3 FNMA and BOA (ECF No. 5) is GRANTED, and the Complaint is DISMISSED
4 without prejudice as to Defendants BOA and FNMA. Plaintiffs shall file any motion
5 for leave to amend the Complaint within **thirty (30) days from the date this Order is**
6 **filed.**

7 IT IS FURTHER ORDERED that within **thirty (30) days from the date this**
8 **Order is filed**, Plaintiffs shall file: (1) proof that service of the Summons and
9 Complaint was effectuated as to Defendant Mortgageit, Inc., or (2) a declaration under
10 penalty of perjury showing good cause for failure to serve Defendant Mortgageit, Inc.,
11 accompanied by a motion for extension of time to serve process.

12 DATED: December 18, 2013

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14 **WILLIAM Q. HAYES**
15 United States District Judge
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